

No. 13,031

United States Court of Appeals
For the Ninth Circuit

SAM ZALL, an individual doing business as Sam Zall Milling Company,
Petitioner,
vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,
and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

SAM ZALL, an individual doing business as Sam Zall Milling Co.,
Respondent.

CLOSING BRIEF IN SUPPORT OF
PETITIONER, SAM ZALL.

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FILED JUN 23 1952

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We have examined the brief for the National Labor Relations Board as the result of which we believe some clarification is necessary on the question whether the Employer was met with a clear cut demand for bargaining and recognition. By the use of generalities the conclusion is drawn that such a demand was made.

It is our position that the opposite occurred.

In order to determine what actually did occur we take the liberty of stating the record on the point in full.

The organizer, Cecil F. Gamble testified that in company with his associate Mr. Hanifin, and at a time when they had a card from one employee only, he met with the Employer on September 26, 1950.

"The Witness. We met Mr. Zall, we stated our position *that we were planning on organizing his employees and starting an organizing drive in this area.* The balance of the conversation was to explain the purposes and principles of the American Federation of Grain Millers and to present him with a contract for his study and approval.

Q. (by Mr. Law). Well, now, let's see. I am not sure that we were getting what was actually said. As I understand it, you went in and told Mr. Zall that *you intended to seek representational rights* for his employees?

A. *That's right.*

Q. And did he make any reply?

A. He said that his plant was like a big family and that whenever he had any trouble in the plant why he went out and adjusted them, and he said that he was a man of a few words and he laid his cards on the table and says, 'I don't want a union here and my people do not need a union.' And I stated to him that I could appreciate his position, now not knowing too much about the principles and policies of the organization, but after we had got better acquainted, why he would be more satisfied. And he says, 'I have stated my position; we do not need a union in this plant.' " (Tr. pp. 86-87.) (Italics ours.)

The Assistant General Counsel then exhibited to him the blank form of contract which he had presented to the Employer and the following ensued:

"Q. Now, did you have any conversation with respect to General Counsel's Exhibit No. 3 for Identification?

A. This is number 3?

Q. Yes, the proposed contract?

A. No, we didn't go into any discussion, other than Mr. Zall stated that he would take the contract and study it. I endeavored to make an appointment and he said that he would take it and read it and study and bring it back, and for me to drop back in a week or so and if he liked it he would make an appointment at that time.

Q. And was that all you remember of the conversation on or about September 26th?

A. That is right. We left the premises at that time.

Q. Now, as I understand it, *you told Mr. Zall that you intended to seek to organize his employees.* As of the time of that conversation, had you engaged in any organizational activities among the employees?

A. We had one man, Jess Stovall." (Tr. p. 88.) (Italics ours.)

After testifying that at a later date cards were obtained from other employees the witness reported a meeting between him, his associate and the Employer, on the sidewalk before the place of business on October 3, 1950. His testimony is as follows:

"Now, what was your conversation with Mr. Zall on that occasion?

A. I asked Mr. Zall if he had read and studied the contract. He said, 'Yes', he had. I asked him what he thought of it, and he said he thought it was a very good contract, but that was one man's opinion. *I asked him if he would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative.* He stated that he had already previously stated his position that he did not want a union in the plant. *I asked him if he would consent to an election if we had over thirty per cent.*

Q. Thirty per cent what?

A. Thirty per cent of the membership signed up. Signed up means the authorization cards. He says, 'Have you got them?' I said 'Yes.' He said, 'Let me see them.' I said 'Oh, no.' I said, 'That is for the Board, and if the Board decides to let you see the authorization cards, that will be another matter.' He stated again that he had previously made himself known on this matter and at that time we should have, and he went into the plant and we left the premises.

Q. You say he stated that he had previously made himself known on this matter. Are you attempting to repeat his words?

A. I was attempting to repeat his words as nearly as I possibly could, yes.

Q. Is that all you remember about your conversation with him?

A. That is all at this time that I can remember.

Q. *Did you discuss petitioning for an election?*

A. *Well, I did discuss petitioning for an election.*

Q. What did you say in that connection?

A. I said to him, I says—but that was after I had made the statement that if we had over thirty per cent of the signatures and he asked me if—we have already gone through that—he says, ‘Go ahead and have your election.’ And he says, ‘That is when our good relations will cease, when you have an election.’ (Tr. pp. 93-94.) (Italics ours.)

He further testified that thereafter he filed a petition for an election with the Board which was later withdrawn. (Tr. p. 95.)

On cross-examination he testified that one of the employees, Jess Stovall, had been approached by him and had signed the one card he had in his possession when he first approached the Employer. In this regard the following occurred:

“Q. Let me ask you, was there anything said that the fact of his signature to this card was that there should be an election held as to whether or not your organization or some other organization would represent the employees?

A. Definitely so. That is the procedure of our organization, and it is the purpose of our Recognition Card, is to gain their signature for their Godgiven right to authorize us to petition for an election in the courts of the law.

Q. Now, tell me what you told him about that?

A. I told him that that would be the procedure.

Q. That there would be—

A. We had to have the cards. We had to have their signatures.

Q. For an election?

A. For an election." (Tr. pp. 113-114.)

Further:

"Q. I am sorry, that is not what I asked you. The question I put to you was this, and you can give me a yes or no on it.

When you walked away from the plant on the twenty-sixth of October, 1950 (should read September, 1950) you did not consider the negotiations were at an end, did you?

A. Truthfully, I cannot say that I expected negotiations at *that* time.

Q. *But you were intending to come back and try again?*

A. *After his study and approval.*" (Tr. pp. 119-120.) (Italics ours.)

The testimony of the Employer on the point is as follows:

"Q. And what was your first knowledge that Mr. Gamble, or Mr. Hanifin, on behalf of the complaining union, were in or about your premises?

A. The 26th of September.

Q. That's when they have testified that Mr. Gamble called on you?

A. That's when they called on me in my office.

Q. What transpired at that time?

A. Well, they came into the office and introduced themselves and brought up the subject of a possible contract between me and themselves as representing the men, and words to that effect, and I told them that it was a one-man business

and that being a one-man small business that we had gotten along fine without any union representation, that we were getting along fine, and that I personally was not interested in having a union contract negotiated for.

Q. The conversation was on a friendly tenor?

A. It was on a friendly tenor, yes.

Q. And at that time did one or the other of the gentlemen give you a contract, their form contract for your consideration?

A. Yes, it was a master contract, what they called a master contract, and they give it to me to look over.

Q. Who appeared to be taking the lead in the conversation? Mr. Gamble, or Mr. Hanifin?

A. Mr. Gamble.

Q. Did you say anything to them to the effect that so far as you were concerned there would be no union in your plant?

A. Well, I told them that as far as I was concerned, personally, that I didn't particularly need a union to negotiate with.

Q. Now, after that, they were back again, weren't they?

A. Yes.

Q. And that was along about the third of October?

A. The second or third.

Q. And that conversation took place some place around the office of the plant, out on the sidewalk?

A. Yes.

Q. And you heard Mr. Gamble's testimony? Was that substantially correct?

A. Yes.

Q. You tell us what was said in that conversation.

A. I don't recall word for word what was said. Mr. Gamble or Mr. Hanifin stated that they would like to negotiate, and I told them that I wasn't interested in negotiating, and *then they said, I believe, that in that case we would have to have an election*, and I said—which was all new to me; I didn't know what they particularly meant by that, and he explained to me that if they had authorization cards from 30% of the men, that they could file with the NLRB for an election, *that if they won 51% of the votes, that they would then be the bargaining agent for the men.* They were just getting ready to leave, almost in their car, when he explained that to me, and I said, 'Well, go ahead and file for your election.'

Q. Did you ask him—

A. I asked him when he told me—he then told me—I then asked him, 'Well, do you have 30% of the votes, authorization votes in this establishment?' and he said, 'Yes.' And I said, 'Well, may I see the cards, or will you tell me the names of those who authorized you to say that?' And he said, no, he wouldn't. I don't know the exact words he used, but he said no, he wouldn't. That was it. He wouldn't tell me or show me who they were.

Q. Well, on that day, when earlier in the conversation you said to him you didn't need a union or words to that effect, at that time you didn't even ask his verification that he had 30% authorizations, did you?

A. *I didn't have the slightest inkling that he was prepared to negotiate.*

Q. Well, were you aware, or had you been informed by any of your men that either Mr.

Gamble or Hanifin had been in there talking about them?

A. Yes, Cotton had told me once or twice that the union men were active at the plant and I told Cotton that if he saw them again not to give them permission to talk to the men on my time, and I guess he never saw them again to tell them that.

Q. In any event, on October 3rd, or whatever day it may have been, when you made the statement that you didn't need a union, you had no knowledge that they had signed anybody up?

A. Not the slightest." (Tr. pp. 155-158.)
(*Italics ours.*)

The conclusion seems inescapable that when the organizers first approached the Employer they had not been authorized by a sufficient number of the employees to make them the bargaining agent in any event. Their efforts at that time were directed to advising the Employer that they "were planning on organizing his employees and starting an organizing drive in this area"; that they "intended to seek representational rights for his employees". (Tr. p. 86.) When they returned on the second occasion, while they may have said they "would like to negotiate", their evident purpose was to determine whether the Employer "would consent to a joint election which was customary between unions and employers for the purpose of recognition of the union as his employees' representative". (Tr. p. 93.) The Employer was asked, "if he would consent to an election if we had over thirty per cent" but he was never allowed to answer the question because he and the organizer became in-

volved over whether or not he should be allowed to see the cards and the Employer finally advised him "to go ahead and have your election". (Tr. pp. 93-94.)

At the risk of being repetitious, we again say: The Employer is a small country businessman. He was acting without legal advice. He did not even know that the claim was being made he was subject to the jurisdiction of the Board. The organizers presumably were experts in their field. They made no demand on him to negotiate on either occasion. Neither has so testified. They had induced the men to sign the authorization cards on the basis of a proposed election. They were talking to the Employer only about an election. They filed a petition for an election which for reasons best known to themselves they later withdrew.

It seems most unjust and unfair and not within the spirit of the Acts on such a tenuous basis, to find that the Employer wilfully refused to negotiate with an alleged bargaining agent when no demand even in ordinary English was made on him in that respect.

How unjust and unfair the result of such a conclusion would be, is demonstrated by the fact that at the present time only two of the original employees are still with the Employer. The wish of the majority, whatever it may be, is apparently not to be consulted if the Board's position is sustained.

And again at the same risk, we say that the Field Examiner himself had serious doubts that the request for recognition was in proper form. (Tr. p. 29.)

Counsel for the Board attempt to distinguish the *Valley Broadcasting* case. We submit the authority is definitely in point on the facts and on the law and should govern here.

Before concluding, we have noticed an error in our Opening Brief which until now has escaped our attention. The second paragraph on page 10 of our Opening Brief which appears outside the quotes should be in the quote as it is actually part of the Field Examiner's report.

That paragraph begins with the words "Gamble also testified * * *" and ends with the words "* * * on the 16th of the month".

CONCLUSION.

We respectfully submit that the decision of the Board should be directed to comply with the dissenting opinion of the Honorable Mr. Murdock in the event this Court shall determine that the Board had jurisdiction of the controversy.

Dated, Marysville, California,

June 20, 1952.

Respectfully submitted,

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